of the operator, but when he was performing the duties of a messenger boy. It could not be contended that a messenger boy would be acting within the scope of his general authority in accepting an oral message. If, however, the oral message had been delivered to the operator at his place of business and he had either written it out or transmitted it without requiring it to be written, the Company would be held liable for any subsequent breach of duty.

I am, therefore, of the opinion that the verdict is contrary to the law and the evidence, and the same is set aside.

IN THE CORPORATION COURT FOR THE CITY OF ROANOKE, VIRGINIA.

SCHOLTZ *v.* GAMBILL.

(March, 1909.)

1. A substantial compliance with the law regarding the posting of notices of an election is sufficient. If the people in fact did have sufficient knowledge of the pending election, from such posting of notice, the notice is sufficient.

2. The illegal acceptance or rejection of voters, if it is wholly insufficient of itself to affect the result of the election, is not ground for invalidating it.

3. It is a mandatory constitutional requirement that the treasurer shall prepare and furnish for the use of the judges of an election a list of all persons who had personally paid their poll taxes for the three years next preceding that in which the election is held. It is an essential prerequisite to a regular and legal election.

4. The treasurer's list is a species of registration, upon which a citizen's name must appear, unless he be an old soldier, to entitle him to vote, and if it be so tainted with uncertainty as to amount to no list at all, the election is illegal.

5. The statements upon the face of the treasurer's list, however explicit and emphatic, are not incontestible in a contested election in the court to which the decision of such contest is submitted, and fraud, gross irregularity or fatal omission may be shown.

6. The list required by law is a statement of the names of all those persons who the treasurer can swear that he is satisfied have paid their poll-taxes personally within the proper time, which it is his duty to ascertain before he puts a man's name upon the list, and if the list furnished is not in fact such a statement, but merely a collection of

names of all persons whose taxes have been paid, regardless of by whom or from what source, it is not such a list as the law requires, and an election based thereon is invalid.

Upon a contest of a local option election.

WALLER R. STAPLES, J. The petition contains fifteen (15) assignments of cause for setting aside this election. Of these four (4) have been disposed of upon demurrer, one confessedly not relied upon, and one abandoned under the recent ruling of the appellate court as to the validity of the Ward law, and there remain for consideration but the first, seventh, eighth, tenth, eleventh, thirteenth, fourteenth and fifteenth

These present three general propositions, to-wit:

First—The posting of the notice of election (assignment 1).

Second—The illegal votes accepted and the legal votes rejected (assignments 8, 10, 11, 13, 14 and 15), and

Third—The validity and sufficiency of the list prepared by the treasurer for the purpose of, or claimed to serve as showing the persons "who had paid their poll taxes for the years 1905, 1906 and 1907," which list is admitted to have been the actual voting list used by the judges of election to ascertain who should be permitted to vote (assignment 7 as amended.)

(After an introductory comment upon the duty of a court to decide according to law and not to be influenced by considerations of expediency, the opinion proceeds as follows.)

Elections are instituted that the people may thereby give expression to their will upon governmental issues, and being conducted by and for the people, their conduct is not to be tried by the same strict application of the rules of law which measure the performance of judicial or other permanent official acts, yet being the source from which all governmental agencies and actions draw their life and sustenance they must be conducted with such a measure of certainty that results are brought within the scope of ascertainment and not left without to vague conjecture.

Applying then to these questions the test of substantial compliance and practical certainty I am of the opinion that concerning:

First—The posting of the notices of election, that while there was not a strict compliance with the mandate of the law in posting said notices, still the purposes of that mandate have been substantially subserved. The office of judicial process is that the court may acquire jurisdiction of the persons and the issue and thus be enabled and empowered to ascertain and enter up its judgment. The office of election, or other assembly, notices is that the parties may pursuant thereto, assemble and for themselves determine and effectuate their judgment. The first serves

a double purpose, it gives authority to the tribunal and imparts knowledge to the defendant; while in elections the authority comes from the statute and the order or writ commanding that it be held, and there only remains to the notice of election, that it imparts knowledge to the voters. Once we pass from the necessity for a strict compliance requisite for constructive service, to the sufficiency of substantial compliance, we immediately abandon all sanctity of form and if it be ascertained that in fact the people did have sufficient knowledge of the pending election then the purpose is subserved and the notice is sufficient. I may be asked why then the holding on the demurrer that there is an absolute necessity for posting the notice at all, if all the people were otherwise aware of said election. The answer is clear to my mind. Advice or information is not knowledge. A citizen may see twice daily in the newspapers that an election is to be held and may hear all his neighbors so declare, yet he should have opportunity for verifying that information by means of knowledge from official source. Once put him upon inquiry and give him the means of ascertainment after reasonable diligence and it is sufficient. In this case he had both. The broadest possible dissemination of information is shown by the record and the official notice was posted where any reasonable inquiry could have found it, to-wit, at the places where the last preceding election, and very near to where several recent elections, had been held and within one hundred or one hundred and fifty yards of the places designated by the proper authorities. In other words, I am fully persuaded from the evidence that there was no appreciable number of voters who did not have information of this election or who, if they were really seeking official confirmation thereof could have failed to find it.

Second—The illegal votes accepted and the legal votes rejected.

Applying the tests laid down in my former opinion, which I will not here further advert to, I find from the evidence that there were:

Under assignment seven, three votes illegally excluded.

Under assignment eight, 64 votes illegally accepted.

Under assignments ten, eleven and thirteen, 14 voters illegally accepted.

Under assignments fourteen and fifteen, nothing. Making a total of eighty-one (81) irregular votes, accepted and rejected. This is wholly insufficient of itself to affect the election. There were twelve men who it was proven had in fact personally paid the requisite poll taxes but whose names were not upon the treasurer's list, but it is not shown that the alleged misprision of the treasurer as charged in that connection, contributed to their

disfranchisement and they are not considered in ascertaining the result.

Third—The validity and sufficiency of the treasurer's list.

The amended petition claims in substance that:

A. It is a constitutional requirement that the Treasurer shall prepare and furnish for the use of judges of election a list of all persons who had personally paid their poll taxes for three years next preceding that in which the election is to be held. In this case for the years 1905, 1906 and 1907.

B. That this mandatory requirement was wholly ignored since:

(a) No paper purporting to be such a list was ever in fact prepared by the Treasurer.

(b) Nor did the Treasurer undertake to prepare such a list.

(c) Nor was it possible for the Treasurer under the state of the records in his office relating to taxes for these three years, to have prepared such a list.

The demurrer to these allegations is predicated upon the following propositions:

A. Such a list is not an essential pre-requisite to the holding of a valid election.

B. The allegation should and does not show the specific effect which the alleged irregularity or omission actually had upon said election.

C. Since the amendment was offered to conform to the proof, that there was in evidence a paper purporting upon its face to be such a list and that as this paper was prepared and verified by the Treasurer it is incompetent for the Treasurer or any other person to offer parol testimony to vary or contradict the recitals therein contained.

Upon the first proposition of law, to-wit, the essential pre-requisite of such a list—I have expressed an opinion in passing upon the first general demurrer, from which I see no reason to depart. In brief it was as follows:

The preparation of such a list is commanded by the constitution and is by that solemn instrument made the last final and conclusive test of the right to vote. No citizen has the right to vote without the personal prepayment of his poll taxes. There can be no regular, orderly or legal election without placing in the hands of the judges of election some legal measure of the qualifications of the proposing voter by which his right to vote can be determined.

But were this proposition not true, were it possible to conduct an election otherwise, still both the constitution and the statute have required that the judges of election be supplied with this proper legal evidence and be controlled (within the limits of its proper statements) solely and conclusively thereby. In other

words the Constitution has in effect said that no citizen shall vote unless it appears from the Treasurer's list that he has paid said taxes, etc. How then can the judges lawfully permit him to vote unless they have such a list by which to measure his right to vote?

We come to the second proposition of law, to-wit:

Is it necessary that contestants shall show that the failure to prepare the list actually altered the result of the election, or is it sufficient for them to show that this failure has interjected into the election an element of uncertainty so serious that no definite result thereof can be legally ascertained? If contestants sought to alter the result of the election and establish it as thus altered, then the first proposition would be correct, but they are charging only that there can be no legal result definitely ascertained; are charging merely that it was an "undue election." The statute makes it the duty of this court to annul the election if it was an "undue election," and it would seem clear that an election, whereof the result was so permeated with doubt and so tainted with uncertainty as to prevent its accurate ascertainment, was necessarily an undue election. If then the Treasurer's list was in fact so tainted with uncertainty as to amount to no list at all, then does it follow that the same taint of uncertainty and illegality attaches to the election held thereunder.

As has been repeatedly said throughout this hearing, the Treasurer's list is a species of registration—is, in fact, the more important half of a divided record of registration. The Constitution prescribes two records of conditions precedent to voting. 1st. The permanent roll of voters commonly called "registration books;" and 2d. The tax list referred to. The appearance of the voter's name upon the first does not entitle him to vote (except he be an old soldier), unless it also appears upon the tax list. Therefore, if we use the term registration in its older accepted meaning, to-wit: "the record evidence entitling a person thereon named to vote"), we find that the registration in Virginia is a double record, of which the Treasurer's list is one.

As I have before observed, elections furnish the only means whereby the people may express their will. The will of the people is the source of all govermental action, and that action is attended with danger, tainted with corruption and followed by a loss of public confidence, in proportion as the distinct and audible tones of public utterance are muffled, suppressed or made uncertain by fraud or error. To vote is not a natural right, it is a privilege conferred by the State upon its chosen citizens. These citizens, upon whom that choice has fallen, and who have complied with the conditions prescribed, alone can voice the public purpose or choice, and when there is mingled with the

voices of those who have the *right* to speak, the clamour of those who are denied the right, the resultant utterances are so uncertain that no man and no tribunal can say with confidence or certainty that the popular will has been expressed.

"When a strict compliance with the terms of the registry law by election officers is not essential to preserve the purity of the election, the election will not be affected by irregularities unless they are such as to affect the result. But where the irregularities are in matters of substance the vote of the precinct must be rejected or the whole election rendered void." 2d Amer. & Eng. Enc., Vol. 10, p. 618.

What can be more of substance than the means of ascertaining who constitute the duly qualified electorate?

Every illegal vote accepted at the polls "kills" some legal vote, and amounts to the denial to one duly qualified of the right to vote. Every illegal voter placed on the list amounts to erasing therefrom the name of one legally entitled to appear thereon.

"The law provides that each person eligible shall have opportunity to qualify himself to vote, and if such opportunity be denied or withheld, by accident or inadvertence, such denial would vitiate the election." Perry *v.* Whitaker, 71 N. C. 475; Van Bokkelen *v.* Cannaday, 73 N. C. 198; McDowell *v.* Rutherford, 2 S. E. R. 358.

Judge Cooley, in discussing this question, has gone even further, and says that the election must be set aside even if the uncertainty may be afterwards dispelled, predicating his conclusion upon the proposition that since the judges had no proper evidence before them as to the qualification of voters, they had no right to make resort to improper evidence, even if it should afterwards happen that that evidence chanced to speak the truth. In other words, that the judges of election have no right to act upon any evidence but legal evidence. He says at page 907:

"And where the law requires such a registry, and forbids the reception of votes from any person not registered, an election in a township, where no such registry was ever made, will be void AND CANNOT BE SUSTAINED BY PROOF THAT NONE BUT DULY QUALIFIED ELECTORS HAVE IN FACT VOTED."

Upon the third proposition of law, to-wit: The incontestibility in this court, of the statements upon the face of the Treasurer's list, I have to revert to my opinion upon the first demurrer. There I reached the conclusion, fortified as I believe both by reason and authority, that the act or finding of no officer or tribunal, except it be the judgment of a superior court of record acting within the scope of its general jurisdiction, can by its own recitals of jurisdictional pre-requisites, however explicit or em-

phatic those recitals may be, accord to itself an immunity from inquiry into the truth of those recitals; that officers and inferior courts enjoy no such immunity where their acts or findings are subjected to direct attack, and further that when the Legislature submitted the regularity and result of this election to the inquiry and determination of this court, it thereby constituted this proceeding a direct attack thereon as well as upon every action, ministerial or judicial, upon which that validity must depend.

The statute commands that this court apply to this entire proceeding the Constitution and the laws, and that its judgment herein be based "upon the very right and merits of the case." This mandate could but poorly be obeyed if this court should refuse to hear a charge of fraud or gross irregularity or fatal omission. In such cases the courts will (in the language of the supreme court of Illinois in People *v.* Thacher, 14 Am. Rep. 317), "look through the formal evidence of the right to the right itself and set aside the return of elections when necessary to promote the ends of justice."

The demurrer to the amended petition may be overruled and likewise the objection to the testimony of Messrs. Davis, Turner and Captain Wortham.

I shall not undertake to follow the wide range of discussion as to what is meant by the language of the Treasurer's certificate, "Who have paid their poll taxes, etc.," nor the distinctions claimed and controverted for the opinions in Tazewell *v.* Herman, and Tilton *v.* Herman, recently decided by the appellate court. It is now settled beyond all controversy that only those who have personally paid their poll taxes can rightfully have their names on the Treasurer's list. That a mandamus will lie to compel the Treasurer to exclude from said list the names of all persons who have not personally paid said taxes. Hence that it is the plain and unavoidable duty of the Treasurer, before he puts a man's name upon said list to ascertain to his satisfaction that the taxes have been personally paid and with such certainty that he can verify that statement upon oath.

The law imposes upon the Treasurer the duty to ascertain that fact. If he fails to ascertain that fact as to one man whose name appears on said list, then that name is necessarily wrongfully put there, and it would likewise follow that if he fails to make that ascertainment as to all whose names appear thereon, then all names thereon are there wrongfully, and there is no list at all.

The list required by the law is a statement of the names of all those persons who the Treasurer can swear that he is satisfied have paid their poll taxes personally within the proper time. If the list furnished is not in fact such a statement, but is merely a

collection of names of all persons whose taxes have been paid, regardless of by whom or from what source said payments were made, then it is in no wise the record required by law and furnished no proper, safe or sufficient guide by which the judges of election might act in admitting or rejecting votes. Now, the undisputed facts are these: Since 1904 it has been the practice of the Treasurer's office to receive poll taxes from any person offering to pay them, whether said payment was offered by the person assessed or some other person. That of all taxes collected in the year 1905, and for that year, there was no record kept by which it would be now possible, or was then possible, to ascertain whether such payments were personal or otherwise—were legal or otherwise. That in fact, about THREE HUNDRED DOLLARS was received on two occasions from two individuals in payment of the poll taxes for about ONE HUNDRED AND NINETY VOTERS, but that said payments were received and the records thereof made and kept just as if said taxes had been paid by the persons assessed. That of the taxes assessed for 1905, there were other instances of similar payment not recalled by the witness, and as to which the evidence is not so clear. It is likewise in evidence and is also uncontradicted that all the poll taxes collected for the years 1906 and 1907, there were at least ten per cent. thereof paid by the hands of persons other than the parties assessed and that when such payments were made no effort or inquiry was made to ascertain whether such payments were from the estate or funds of the parties assessed; in other words, no effort was made to ascertain whether such payments would entitle the name of the party whose taxes were so paid to appear on said treasurer's list. No record was made to distinguish these payments from those paid "in physical person" and that when the Treasurer's list, which was to contain the names of all persons entitled to vote at the last November and at this election, was prepared it was merely a copy of the names of all persons whose taxes had been paid, without regard to the right of such persons to have their names appear on said list and without regard to the right of such persons to vote. This list was delivered to the clerk and copies sent to the judges of election. They contained approximately THREE THOUSAND FIVE HUNDRED names, of which number it is definitely proven that at least ONE HUNDRED AND SEVENTY-FIVE were positively not entitled to have their names thereon, and were not entitled to vote, and at least TWO HUNDRED others, as to whose rights in the premises there was not only no knowledge, information or evidence but not the slightest pretense of any effort to secure the same.

The Constitution commands the Treasurer to place on this list

the names of all "who have personally paid;" this must per force include as emphatic a command to exclude from said list all who had not personally paid; this mandate has been wholly disobeyed and the records of this election showed that at least THREE HUNDRED AND SEVENTY-FIVE PERSONS were according to said list authorized to vote, when in fact it is seen that ONE HUNDRED AND SEVENTY-FIVE of these were clearly not ENTITLED to vote and that the right of the remaining TWO HUNDRED to vote had never been ascertained or inquired into in any way whatever.

In Tazewell *v.* Herman, expressly reaffirmed in Tilton *v.* Herman, by the Court of Appeals last week, it was expressly decided that it was the duty of the Treasurer, in the preparation of said list, to distinguish between taxes paid and taxes personally paid, and that a mandamus should issue to compel the performance of that duty. Suppose such a mandamus had been asked for in Roanoke before this election. The Treasurer would have replied that his records did not furnish sufficient evidence to make it possible for him to make that distinction. Could this court then have dismissed the application for the mandamus and let the matter end there? Could an election have been held without said list? The Treasurer would have been directed to list those who he was satisfied had personally paid—to post and publish said list, and thus permit all persons whose names were omitted to apply to this court to have them placed thereon.

An officer being compelled to certify a fact must inquire into that fact and be satisfied of its existence. If he fails to make this inquiry but acts without any evidence or information at all his acts are null and void. Schoonmaker *v.* Spencer, 45 N. Y. 366; Tanner *v.* Hall, 22 Fla. 391. I do not mean that he must swear each person offered to pay his own or even another's taxes. If offered by the one assessed he may presume personal payment. If offered by another he should make inquiry whether the party assessed had furnished the money, if not satisfied he might require some written note of authority, but since he must certify the fact he must necessarily inquire into and be satisfied thereof. In placing each name upon the list here questioned he acted without any information as to whether it could be rightfully placed thereon. His only information was that the man's taxes had been paid. He could not certify that they had been personally paid, yet without this certificate the law was not complied with. This fact is established and not denied, therefore there was no evidence before the judges that any particular individual had the right to vote. There were unquestionably on the list the names of hundreds who had complied with the law, but when the Treasurer sent to the judges of election a mass of names, in which

were hopelessly mixed the names of those who had, and those who had not complied with the law, then the judges were without any means of ascertaining the right of any elector to vote and no lawful election could have been held. This must not be taken in criticism of the judges of election or the Treasurer. These points of law now so clear and plain to us were not, before their introduction and discussion in the courts of the State, so fully known. But it is none the less unavoidably true that this election was held and all the votes thereat received without any legally sufficient evidence of the right of a single voter to have his vote received and counted. An assemblage of voters, however large their number and however full and complete their qualifications, cannot constitute a lawful election. They must not only assemble by authority of law but their respective, several and individual rights to vote must be there submitted to and measured by the true legal test. This is necessary for two reasons, each equal in importance to the other and each sufficient in itself. The first is that the result may be legally ascertained, the second is that the defeated minority may feel satisfied that the victory has been won by a legally authorized and qualified majority. The majority of a people can never rule by mere force of their majority power but only through and with the confidence and co-operation of the reconciled minority. The minority is never reconciled so long as it is restless with uncertainty and a victory at the polls for any party, man or measure is too dearly bought at the price of public doubt as to the regularity, legality and certainty of the result. Judge Cooley has said on page 892 of his book on Constitutional limitations:

"The voice of the people, acting in their sovereign capacity, can be of legal force only when expressed at the time and under the conditions which they themselves have prescribed and pointed out by the constitution * * * statute; and if by any portion of the people, however large an attempt should be made to interfere with the regular working agencies of the goverment at any other time or in any other mode than is allowed by existing law, it would be revolutionary in character and must be repressed."

There being in the city of Roanoke no legal record of those entitled to vote at the last November election, this court and its sessions will be held open at once and indefinitely for the legal establishment of such a record, if the same should be desired and it is believed that such a record could be quickly prepared. If it is the will of the qualified voters of this city that no licenses should issue for the sale of intoxicating liquors that will, can and may be speedily, definitely and legally ascertained, and when so ascertained it will be enforced. But from the records of this election and the evidence adduced under the pleadings, I cannot

see that there has been any legal ascertainment of that will with any degree of certainty and it follows that the election must be set aside.

Since this action would not have resulted but for the matter set up in the amended petition, and matters thus presented might have been presented and passed on to the exclusion and avoidance of this protracted, expensive and laborious hearing, the judgment will be entered only upon the condition that the contestants pay to the contestees their just and proper costs about this hearing expended.

I will entertain from contestees a motion for an order directing a new election, predicated upon the original petition, if they desire to make such motion and will hear argument as to the right to enter such order if the contestants desire to oppose said motion. Otherwise an order may be entered, setting aside the election, with costs to contestees and dismissing this case from the docket.